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No. 99-1746

In the Supreme Court of the United States

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

HERBERT ANDERSON,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE LOUISIANA SUPREME COURT

PETITION FOR CERTIORARI OF WATERMAN STEAMSHIP CORPORATION

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QUESTION PRESENTED FOR REVIEW

Petitioner Waterman Steamship Corporation submits that its application for a Writ of *Certiorari* to the Louisiana Supreme Court presents the following question for review:

1. DOES THE SUITS IN ADMIRALTY ACT, 46 U.S.C. SECTION 745, PRECLUDE A SEAMAN FROM ASSERTING AGAINST THE OPERATOR OF A VESSEL CHARTERED TO THE UNITED STATES DEPARTMENT OF DEFENSE AND CARRYING EXCLUSIVELY MILITARY CARGO, CLAIMS FOR UNSEAWORTHINESS AND MAINTENANCE AND CURE THAT, IF PROVEN, AUTOMATICALLY GIVE RISE TO A MARITIME LIEN WITH THE ATTENDANT RIGHT TO PROCEED *IN REM* TO ARREST THE VESSEL?

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DECISIONS BELOW

1. On July 9, 1999 Waterman filed a motion for summary judgment in Louisiana Civil District Court, Parish of Orleans, asserting that it was immune from suit by Herbert Anderson by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act, 46 U.S.C. section 745. Waterman argued that Anderson's "claims should be directed against the United States of America, and should be brought in federal district court."

2. On October 12, 1999 the Civil District Court denied the motion for summary judgment, holding (1) Anderson could pursue Jones Act negligence as well as unseaworthiness, and maintenance and cure claims against Waterman, the operator of the vessel that was chartered to the government and carried exclusively military cargo; and (2) Waterman could not invoke the exclusivity of liability provisions unless it could show that the government "was in charge of the day to day operations of the vessel where plaintiff was injured."

3. On December 17, 1999, the Louisiana Fourth Circuit Court of Appeals denied Waterman's Application for Supervisory Writs, holding (1) *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir.1989), *cert denied*, 493 U.S. 1045 (1990) was dispositive as to Anderson's Jones Act claims; and (2) factual questions remain as to whether the United States, that is not a party to the suit, could be held liable to plaintiff in admiralty.

4. On February 18, 2000 the Louisiana Supreme Court denied Waterman's application for supervisory writs without written reasons.

JURISDICTIONAL STATEMENT

Jurisdiction of the trial court was allegedly predicated upon the Jones Act, 46 U.S.C. section 688, the General Maritime Law, and the savings to suitors clause of 28 U.S.C. section1333. Waterman unsuccessfully argued in state court that the Suits in Admiralty Act requires that Anderson's claims "should be brought in federal district court" and that the proper party defendant is "the United States of America" rather than the private operator of the vessel under charter to the United States. The state courts rejected Waterman's claim that it was immune from suit by virtue of the federal statute, 46 U.S.C. section 745.

Waterman requests that this Court review the February 18, 2000 ruling of the Louisiana Supreme Court that left standing the December 17, 1999 ruling by the Louisiana Court of Appeals for the Fourth Circuit, as well as the October 12, 1999 ruling by the Civil District Court for the Parish of Orleans, denying Waterman's motion for summary judgment.

This Court has jurisdiction to review the rulings below by writ of *certiorari* pursuant to 28 U.S.C. section 1257. The rulings by the Louisiana courts deprive Waterman of its federal statutory immunity from suit, and expose Waterman to trial in Louisiana state court on the Jones Act negligence, unseaworthiness, and maintenance and cure claims asserted by Herbert Anderson.

Although 46 U.S.C. section 745 provides Anderson with a remedy against the United States that is exclusive of any other action against the operator of the vessel, the Louisiana Supreme Court order of February 18, 2000 permits the action against the operator of the vessel to proceed to trial. The only remaining issues pending in state court are whether Waterman is liable for negligence, unseaworthiness, and maintenance and cure, and, if so, the amount of damages to be awarded.

The decision by the Louisiana Supreme Court to force Waterman to defend itself on the merits in state court despite the requirement in 46 U.S.C. section 742 that SIAA suits "shall be brought in the district court of the United States" and the prohibition in section 745 against bringing "any other action by reason of the same subject matter against the agent or employee of the United States... whose act or omission gave rise to the claim" constitutes, within the meaning of 28 U.S.C. section 1257, a "final decree" that resolves the Suits in Admiralty Act exclusive federal jurisdiction and statutory immunity issues. This Court therefore has jurisdiction to issue a writ of *certiorari.*

Reversal of the state court on the federal SIAA issue "would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; failure by this Court to act would "seriously erode federal policy" which statutorily immunizes private companies that operate vessels on behalf of the Military Sealift Command from state court suits, and protects national security by precluding seizure of vessels carrying military cargo. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469,

482-83 (1975); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 177-79 (1988). A holding by this Court giving effect to the plain language of the Suits in Admiralty Act would terminate the state court litigation in its entirety.

Supreme Court review under 28 U.S.C. section 1257 is available even though there has not yet been a full-blown trial on the merits, since the highest court in the State of Louisiana has rejected Waterman's claim of 46 U.S.C. section 745 federal statutory immunity, and has disregarded the requirement of section 742 that SIAA suits be brought only in federal district court. *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Schaeffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *Third National Bank in Nashville v. Impac, Ltd., Inc.* 432 U.S. 312 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

STATUTES INVOLVED IN THIS CASE

46 U.S.C. section 741. Exemption of United States vessels and cargoes from arrest or seizure

> "No vessel ... operated by or for the United States... and no cargo owned or possessed by the United States... shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions..."

46 U.S.C. section 742. Libel in personam.

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding *in personam* may be brought against the United States... Such suits shall be brought in the district court of the United States..."

46 U.S.C. section 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims.

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim..."

STATEMENT OF THE CASE

Certiorari should be granted in this case to correct an erroneous interpretation of the Suits in Admiralty Act, 46 U.S.C. section 741 *et. seq.* by the Louisiana state courts. The Louisiana rulings will adversely affect the

public interest by allowing, in contravention of the prohibition contained in 46 U.S.C. section 741, *in rem* seizures of vessels carrying vital military supplies needed by the United States military, and by subjecting private operators that transport military cargo for the United States Department of Defense to suit in Louisiana state courts, in contravention of the exclusivity of liability provisions of 46 U.S.C. section 745 and the exclusive federal jurisdiction provisions of 46 U.S.C. section 742.

The ruling by the Louisiana Supreme Court sets dangerous precedent by permitting to proceed to trial a suit containing allegations of unseaworthiness and maintenance and cure that, if proven, will automatically give rise to *in rem* liens upon a vessel being operated exclusively for the United States government, carrying only military cargo. Under the reading of the Act by the Louisiana courts, a privately owned ship under charter to the United States loaded with a cargo of cruise missiles, ammunition, or military supplies needed to reinforce a contingent of United States troops that may be engaged in hostilities overseas can be arrested and held until civil litigation involving personal injuries is resolved.

This case involves an injury aboard the steamship MAJOR STEPHEN PLESS, a vessel carrying war supplies that is chartered to and operated exclusively for the United States Government, Department of Defense, as a pre-positioned supply ship subject to the orders of the Military Sealift Command (MSC). The issue presented is whether the seaman's exclusive remedy lies against the United States of America pursuant to the Suits in Admiralty Act, 46 U.S.C. section 741 *et seq.*

The MAJOR STEPHEN PLESS is an Afloat

Prepositioning Force ("APF") ship. She is used to carry ammunition and equipment for support of a specially organized Marine Amphibious Brigade (MAB) to enhance rapid deployment of the United States Marine forces. See, Affidavit of Peter M. Johnston at paragraphs 3, 5. The cargo carried by the MAJOR STEPHEN PLESS is exclusively military, non-commercial cargo. *Id.* at paragraph 4.

Pursuant to the terms of the charter party, the United States Government has the right to install on the MAJOR STEPHEN PLESS any defensive armament the Government deems necessary. The Government requires that the master, chief officer, and radio officer must be qualified for a United States Government "Secret" security clearance. All officers must be qualified for a United States Government "Confidential" security clearance. In addition, all of the crew members of the MAJOR STEPHEN PLESS and all officers must be United States citizens. *Id.* at paragraphs 6, 7.

On May 1, 1996, plaintiff Herbert Anderson allegedly tripped on a meat box wrapper on the floor of a refrigeration cooler and sustained injury to his shoulder. His employer, Waterman Steamship Corporation, was operating the MAJOR STEPHEN PLESS on behalf of the Military Sealift Command off the coast of Spain.

Although the Suits in Admiralty Act provides Anderson with an *in personam* remedy against the United States, 46 U.S.C. section 742, and this remedy is exclusive and in lieu of any liability on the part of the operator of the vessel, 46 U.S.C. section 745, Anderson nonetheless filed unseaworthiness, maintenance and cure, and Jones Act negligence claims against Waterman

Steamship Corporation in Civil District Court, Orleans Parish.

Waterman filed a Motion for Summary Judgment, contending that plaintiff's exclusive remedy lies against the United States of America pursuant to the terms of the Suits in Admiralty Act, and that his suit must be brought in federal district court, not state court. The motion was denied by the Honorable Yada Magee, District Court Judge for Civil District Court, Orleans Parish on October 12, 1999. Despite language in 46 U.S.C. section 741 that the Suits in Admiralty Act applies to vessels "operated by or for the United States", Judge Magee ruled that Waterman was not entitled to the benefits of the exclusivity of liability provisions of the Suits in Admiralty Act unless it could show that the government exercised operational control over the day to day operations on board the MAJOR STEPHEN PLESS.

Waterman filed an Application for Supervisory Writs with the Louisiana Fourth Circuit Court of Appeals seeking appellate review of Judge Magee's decision. On December 17, 1999, the Fourth Circuit denied writs, holding that *Williams v. Central Gulf Lines*, 874 F.2d 1048 (5th Cir.1989), *cert. denied*,493 U.S. 1045 (1990) was dispositive as to Anderson's Jones Act claims; and that factual questions remain as to whether the United States, that is not a party to the suit, could be held liable to plaintiff in admiralty.

Waterman then sought Supervisory Writs with the Louisiana Supreme Court. The Louisiana Supreme Court denied the writ application without written reasons on February 18, 2000, thereby allowing the rulings of the lower courts to stand, and subjecting Waterman to trial

on the merits in state court. No trial date has yet been set by the trial court.

ARGUMENT

I. The Louisiana courts erred in allowing to proceed to trial a case involving an injury aboard a vessel operated exclusively for the United States, carrying only military cargo, in which the plaintiff has raised claims of unseaworthiness and maintenance and cure that, if proven, would automatically give rise to an *in rem* lien with the attendant right to arrest the vessel.

A. ANDERSON'S SUIT IS BARRED BY THE SUITS IN ADMIRALTY ACT

As a matter of federal law, Anderson has an exclusive remedy as against the United States of America, and cannot maintain his action against Waterman Steamship Corporation. The Suits in Admiralty Act, 46 USC §§741-745, waives sovereign immunity of the United States not only for suits involving injuries that occur aboard vessels "owned by the United States" but also for suits involving injuries occurring on vessels "operated by or for the United States". 46 USC §741. The damages remedy against the United States pursuant to the Suits in Admiralty Act is "exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim". 46 USC §745 (emphasis added). Accordingly, Herbert Anderson, to the extent that he contends he was injured on board the MAJOR STEPHEN PLESS as a result of negligence and

unseaworthiness, must direct his claims as against the United States. His remedy against the United States is "exclusive of any other action...against the agent", *i.e.*, exclusive of any claim against Waterman.

Many courts have properly applied the rule that where a seaman is injured on board a vessel being operated for the United States, the remedy of the seaman lies exclusively against the United States under the Suits in Admiralty Act. For example, a seaman injured aboard a vessel being operated by American Export Isbrandsten Lines, Inc. for and on behalf of the United States was injured, and he brought suit against the vessel operator. *Carter v. American Export Isbrandsten Lines, Inc.*, 411 F.2d 1185 (2nd Cir. 1969). His suit was dismissed as being barred by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act. 411 F.2d at 1186. Likewise, the remedy of a seaman employed by Marine Transport Lines, Inc. injured aboard a vessel being operated for the United States "lies exclusively against the United States" and "the exclusive liability clause of Section 745...precludes recovery for the same injury against the contract operator whose conduct was the immediate cause of the accident", according to *Cruz v. Marine Transport Lines, Inc.*, 634 F.Supp. 107, 110 (D. N.J. 1986) (emphasis added). Although ordinarily only a seaman's employer is liable under the Jones Act for injuries sustained by the seaman, "The determination of the proper Jones Act defendant in public vessel cases is affected by the exclusive liability provision of Section 745...[S]ection 745 is construed as designating the United States rather than its agent as the entity suable on all claims for harm done by a public vessel as the result of the agent's conduct." *Petition of United States*, 367 F.2d 505, 512 (3rd Cir. 1966). The Louisiana courts in this

case failed to follow this well-established body of caselaw interpreting the federal statute.

B. THE RULINGS OF THE LOUISIANA COURTS RENDER NUGATORY KEY PROVISIONS OF THE SIAA

The Suits in Admiralty Act presently reads as follows, with the key words pertinent to this litigation underlined:

> *"No vessel* owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital sock or in the possession of the United States or of such corporation or *operated by or for the United States shall* after March 9, 1920 in view of the provision herein made for a libel in personam, *be subject to arrest* or seizure by judicial process in the United States or its Possessions..."

46 U.S.C. section 741.

Anderson argued, and the Louisiana courts agreed, that the Act should be interpreted to read "No vessel ... over which the United States exercises operational control ... shall be subject to arrest or seizure...." This is not the language of the statute. The opinion of the Louisiana courts effectively strips the "operated ...for the United States" language from the Act. This Court should correct the state courts' flawed

construction of the federal statute.[1]

Vessels over which the United States exercises operational control are obviously "*operated by*" the United States, and thus already fall within the scope of the Act. The Louisiana interpretation of the Act makes nugatory the additional phrase "*or for the United States.*" Interpretations of a statute that render a phrase nugatory should be avoided.

C. THE LOUISIANA COURTS' INTERPRETATION OF THE SIAA IS INCONSISTENT WITH PRIOR JURISPRUDENCE

The Louisiana court's interpretation of the Act as permitting Anderson to maintain claims that give rise to *in rem* liability on the part of a vessel operated exclusively for the United States military is at odds with prior jurisprudence. This Court, in *Calmar S.S. Corp. v. United States*, 345 U.S. 446 (1953) was faced with the issue of "whether a privately owned steamship, undoubtedly

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[1]The trial court held that it "adopts Plaintiff's argument that the test used by the Courts and more particularly the Federal Fifth Circuit, in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies, is 'operational control'. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further finds that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure." October 7, 1999 Reasons for Judgment at pp. 8-9.

'operated ... for the United States', was 'employed as a merchant vessel' within the meaning of the [Suits in Admiralty] Act while carrying military supplies and equipment for hire." 345 U.S. at 447. Just as Anderson alleged that the Steamship MAJOR STEPHEN PLESS was time chartered and not bareboat chartered[2], so too, the S.S. PORTMAR had been time chartered to the United States. The trial court in *Calmar* had found that "She was owned neither absolutely nor *pro hac vice* by the United States." 345 U.S. at 450. This Court ruled that "[A] vessel operated for, or owned by, the United States cannot now, by virtue of section 1 of the Suits in Admiralty Act, be seized..." *Id.* at 454 (emphasis added). "We hold that the Portmar, a privately owned vessel operated for hire for the United States, was 'employed as a merchant vessel' within the meaning of the Suits in Admiralty Act, although engaged on a war mission." *Id.* at 456.

Under the Louisiana courts' reading of the Act, claims arising on a privately owned vessel operated for hire for the United States engaged on a war mission would not fall within the scope of the Suits in Admiralty Act, so the Louisiana interpretation is at variance with this Court's interpretation of the federal statute.

The interpretation of the Suits in Admiralty Act given by the Louisiana courts frustrates the very purpose of the Act, and, if not corrected by this Court, will take

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[2]The charter party is labeled a time charter, although it has some attributes of a bareboat charter. The Military Sealift Command exercises control over the MAJOR STEPHEN PLESS in a number of ways described in the affidavit of Peter M. Johnston.

us back to the legal status that existed in 1917 when merchant ships carrying supplies for the United States government could be arrested:

> "Prior to passage of the [Suits in Admiralty] Act, merchant vessels of the United States were subject to seizure. Section 9, Shipping Act September 7, 1916, 39 Stat. 730 (46 USCA section 808). *The Lake Monroe*, 250 U.S. 246, 39 S.Ct. 460, 63 L.Ed. 962... The [Suits in Admiralty] Act relieved the United States of the inconvenience resulting from such seizures and gave remedy by libel *in personam* against the United States..."

Johnson v. United States Shipping Board Emergency Fleet Corporation, 280 U.S. 320, 325 (1929).

By allowing Anderson to pursue claims that give rise to *in rem* liability on the part of a vessel being operated for the United States, the Louisiana courts are enabling Anderson to proceed forward to obtain a maritime lien and then arrest the MAJOR STEPHEN PLESS, thereby resulting in great inconvenience to the United States. The rulings below create great uncertainty for the shipping industry that transports government cargo. Under the rationale of the Louisiana courts, vessels chartered to the United States and carrying military hardware could be arrested at any port for a myriad of personal injury, supply, or contract claims unless the private operators could show the government exercised operational control over the day-to-day operations of such vessels, a test that is unlikely to be satisfied where such vessels are privately operated on

behalf of the government. The potential for such vessel arrests will reek havoc on logistics planning and transportation of cargo needed by the United States Military Sealift Command.[3]

As was noted in the first cases interpreting the Suits in Admiralty Act that was adopted by Congress on March 9, 1920, "The apparent intent of sections 1 and 2 of the act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course of transportation, and to substitute for an action *in rem* against the vessel or cargo an action *in personam*." *Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation*, 266 F. 897 (E.D.Pa.1920) (emphasis added).

This interpretation of the Act as substituting an *in personam* claim against the United States for what could otherwise be an actionable *in rem* claim has been applied for many years. For example, at the time of the occurrence giving rise to suit in *Olavarria & Co. v. United States*, 56 F.Supp. 758 (S.D. Ala.1944), the steamship WILLIAM C. ATWATER was owned by the Fall River Navigation Company, chartered to the U.S. Government, and operated for the War Shipping Administration in the merchant service. 56 F.Supp. at 759. Examining the Suits in Admiralty Act, the court held that the purpose of

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[3]The potential for mischief is created by the Louisiana rulings. The holder of a maritime lien on a vessel being operated for the government could, for example, wait until the ship was ready to set sail, or until there was an emergency or national crisis, to arrest the ship, in order to increase settlement bargaining position.

the Suits in Admiralty Act "was to forbid the seizure of the vessel ... operated in the Merchant service, and to give the claimant against either the vessel or the cargo a right to sue the Government *in personam* to recover upon such claim. In other words to substitute the Government for the vessel or the cargo... It is generally conceded that the Suits in Admiralty Act of March 1920 substitutes a remedy *in personam* against the United States for one in rem." 56 F.Supp. at 759. The court also observed that "a cause of action *in personam* against the United States may be maintained ... in those cases where the libelant would have a cause of action *in rem*..." *Id.* at 760. "[I]f the suit could be maintained against a private vessel when the suit was filed, a personal liability can be claimed against the Government." *Id.* at 762 (emphasis added).

The Louisiana courts have failed to heed this principle of federal law that if a suit could be maintained against a private vessel when suit was filed, a personal liability can be claimed against the Government. Herbert Anderson's suit alleges both unseaworthiness and maintenance and cure, claims that could have been maintained against the private vessel, but for the fact that she was being operated for the United States. Since the private vessel MAJOR STEPHEN PLESS was operated for the United States, an *in personam* claim against the United States is substituted for claims that Anderson could otherwise have been maintained *in rem*. 46 U.S.C. sections 741-742. This *in personam* remedy against the United States is exclusive and in lieu of any claim against Waterman, the operator of the vessel. 46 U.S.C. section 745. Suit on such a claim must be brought in federal court, not Louisiana state court. 46 U.S.C. section 742.

D. THE LOUISIANA COURTS ERRED IN EXTENDING *WILLIAMS V. CENTRAL GULF LINES* TO CASES INVOLVING CLAIMS THAT GIVE RISE TO *IN REM* LIABILITY.

The Louisiana courts erred in expanding the holding of *Williams v. Central Gulf Lines*, 874, F.2d 1058 (5th Cir.1989), *cert. denied*,493 U.S. 1045 (1990) to encompass cases involving claims of unseaworthiness, and maintenance and cure, that, if proven, automatically give rise to *in rem* liability.[4]

Williams did not involve claims that exposed a vessel to *in rem* liability, and therefore has no applicability here. *Williams* held (i) there exists a "jurisdictional hook" to sue the United States under the Suits in Admiralty Act where a claim arises on a vessel time chartered to the United States; and (ii) if a claim sounds exclusively in negligence, the United States can be held liable in its capacity as time charterer only if it exercised operational control over the vessel. 879 F.2d at 1061-63. Jones Act negligence and alleged general maritime law negligence were the only claims involved in *Williams*, not unseaworthiness or maintenance and cure.[5] The Fifth

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[4]"We find *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir.1989) to be dispositive in this matter and thus affirm the trial court." December 17, 1999 Order of the Louisiana Fourth Circuit Court of Appeals at p. 1.

[5]The purely negligence based claims in *Williams* involved allegedly negligent medical treatment that had been given by an overseas hospital to a seaman AIDS victim who later died. *Williams*, 874 F.2d at 1079.

Circuit therefore did not have to address whether *in rem* liability of the S.S. BAY would have arisen, and only assessed whether the United States could have faced *in personam* liability in its capacity as a time charterer. Negligence claims such as were asserted in *Williams* do not give rise to maritime liens actionable *in rem*. *Plamals v. Pinar del Rio*, 277 U.S. 151 (1928).

The issue here is not whether the United States would have liability purely in its capacity as charterer of the MAJOR STEPHEN PLESS, but rather, whether the vessel itself could face liability for Anderson's claims. The Fifth Circuit in *Williams* analyzed the government as not having *in personam* liability in its capacity as time charterer since time charterers normally do not have such liability unless they have exercised operational control. The Fifth Circuit did not have occasion to analyze whether the vessel would have faced potential *in rem* liability, however, since no claims were asserted in *Williams* that would have exposed the vessel to liability.

Williams is not dispositive of this case. *Williams* did not disturb the rule that the Suits in Admiralty Act is triggered by the assertion of claims that could expose a vessel being operated for the United States to potential *in rem* liability. The Louisiana courts should not have extended *Williams* to encompass cases involving claims that give rise to *in rem* liability on the part of vessels operated for the United States. Such claims must be directed against the United States.

A vessel is liable *in rem* for unseaworthiness, *The Osceola*, 189 U.S. 158 (1903), no matter who controlled or operated her, so long as the operator was lawfully in possession of the vessel. *Churchill v. F/V Fjord*,

892 F.2d 763 (9th Cir.1989). Accordingly, there are no "factual questions ... as to whether the United States could be held liable to Plaintiffs in admiralty" as the Louisiana Fourth Circuit mistakenly declared. An *in rem* lien arises automatically upon a judgment being entered on an unseaworthiness or a maintenance and cure claim. *The Osceola*, 189 U.S. 158 (1903). The holder of a maritime lien then has the right to proceed *in rem* to arrest a vessel: "An action *in rem* may be brought: (a) To enforce any maritime lien". Supplemental Admiralty Rule C. The only statute barring this outcome is the Suits in Admiralty Act, that prohibits the arrest of vessels such as the MAJOR STEPHEN PLESS, and substitutes in lieu thereof an *in personam* action against the United States. 46 U.S.C. sections 741-742. The allowed *in personam* action against the United States is exclusive of any liability of the ship or of the private operator of the ship. See 46 U.S.C. sections 741, 745.[6]

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[6]The exclusivity of liability provisions of the Suits in Admiralty Act have been triggered by the plaintiff asserting claims that give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS. If plaintiff were to prevail on his unseaworthiness or maintenance and cure claims, he would automatically acquire a maritime lien upon the vessel where his injury occurred, the S.S. MAJOR STEPHEN PLESS. By allowing Anderson's claims to proceed forward, the Louisiana courts have thereby exposed to arrest a vessel that is operated exclusively on behalf of the United States military. The "Louisiana two-step" that has effectively been sanctioned by the Louisiana Supreme Court would, if not corrected by this Court, enable a plaintiff to defeat section 741 by first obtaining a maritime lien by obtaining a judgment in state court on an unseaworthiness claim against the

There are two means by which the government can be held liable under the Suits in Admiralty Act for maritime personal injuries, and once liability is triggered, it is exclusive in lieu of any and all liability of the private operator of the ship. The first means by which the United States can be held liable is if a similarly situated private person time chartering the vessel would have been held liable *in personam* for Jones Act negligence. The Fifth Circuit has indicated that in order to meet this test, it must be demonstrated that the government exercised operational control over the vessel. The second means by which liability on the part of the United States can be triggered is if the vessel that is being operated for the United States, upon which the injury occurred, would be liable *in rem*. For this test, operational control is irrelevant. If a plaintiff is injured in the service of the ship, his right to maintenance and cure attaches as a lien to the very last plank of the ship. Likewise, an award for injuries caused by unseaworthiness of the vessel automatically gives rise to a maritime lien on the ship. See, *The Osceola*, 189 U.S. 158 (1903).

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private operator, then, secondly, proceeding with a federal Rule C action to enforce the maritime lien already created in the Louisiana state court action. The Suits in Admiralty Act was designed to eliminate and foreclose this possibility. In exchange for the right to arrest a vessel for an *in rem* claim or a maritime lien, the Act substitutes an *in personam* remedy against the United States. This *in personam* remedy against the United States is "exclusive of any other action by reason of the same subject matter against the agent or employee of the United States... whose act or omission gave rise to the claim..." 46 U.S.C. section 745.

The Suits in Admiralty Act applies whenever a claim has been asserted that could give rise to *in rem* liability on the part of a vessel that was operated by or for the United States. The government, rather than the private operator is the proper party defendant where a plaintiff has asserted unseaworthiness or maintenance and cure claims that expose a vessel being operated for the United States to potential liability:

> "Since the vessel was being operated by Western Tankers for the United States, as time charterer, and was carrying its oil, Perry could have sued the United States under the Suits in Admiralty Act, 46 U.S.C. section 741 et. seq., for his personal injuries due to the unseaworthiness of the vessel, even though she was manned, equipped and maintained by the owner."

Western Tankers Corp. v. U.S.A., 1975 A.M.C. 775, 780 n. 10 (S.D. N.Y. 1975).

An unseaworthiness claim that gives rise to *in rem* liability on the part of the vessel is transferred by virtue of the Suits in Admiralty Act to an *in personam* claim against the United States:

> "Were this suit based upon the general law of maritime tort, the libelant would have a right *in rem* against the ship if his cause of action was the unseaworthiness of the vessel. *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760. I do not question that, in such case his right of action would be transferred to the United

States by the Suits in Admiralty Act..."

Burkholder v. U.S., 56 F.Supp. 106, 109 (E.D. Penn. 1944) (*Burkholder I*).

Claims for maintenance and cure, that give rise to potential *in rem* liability, trigger the exclusivity of liability provisions of the Suits in Admiralty Act where the injury occurred aboard a vessel being operated for the United States:

> "The second cause of action [being asserted against the United States], for maintenance and cure, is maintainable. This right is a contractual right independent of the seaman's right to recover indemnity under the general maritime law or indemnity under the Jones Act. Since he would have had a right *in rem* against the ship prior to the passage of the Jones Act for maintenance, cure and wages, this cause of action will be transferred by the Suits in Admiralty Act to the United States." (emphasis added)

Burkholder v. U.S., 60 F.Supp. 700, 702 (E.D.Pa. 1945) (*Burkholder II*).

Other cases apparently rejected by the Louisiana courts, holding claims that could give rise to *in rem* liability on the part of a vessel operated for the United States must be brought *in personam* against the United States under the Suits in Admiralty Act include this Court's decisions in *Canadian Aviator v. United States*, 324 U.S. 215, 219 (1945) ("[S]ince the arrest and

seizure of a vessel incident to an admiralty proceeding in rem proved embarrassing, Congress in 1920 adopted the Suits in Admiralty Act."); *Eastern Transportation Co. v. United States*, 272 U.S. 675 (1927); and the Eleventh Circuit's ruling in *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir.1990).

Another case that supports Waterman's position and demonstrates the Louisiana courts erred is *Nakano v. United States and Vessel Charters, Inc.*, 1988 AMC 2220 (S.D.Cal.1988). *Nakano* was an *"operated for"* case in which the SS SANTA ADELA "was owned by Vessel Charters and time-chartered to the United States and operated for the United States." *Id.* at 2221. Maintenance and cure claims had been asserted against the private operator of the vessel. Claims against the private operator were dismissed pursuant to the Suits in Admiralty Act:

> "A remedy is provided plaintiff for recovery against the United States by the Suits in Admiralty Act, 46 U.S.C. sec. 741, since the vessel is considered to be 'operated by or for the United States.' ... This remedy is exclusive. 46 U.S.C. sec. 745 provides that where a remedy is provided by the Suits in Admiralty Act, it shall be 'exclusive of any other action by reason of the same subject matter against the agent or employee of the United States.' Accordingly, Vessel Charters, Inc.'s motion to dismiss is granted because, as a matter of law, a direct suit by plaintiff against Vessel Charters, Inc. is not available.... Defendant, United States of

> America, in the instant case stands in the place of the shipowner under 46 U.S.C. sec. 745, and thus is responsible for maintenance, which is the obligation of the shipowner."

Nakano, 1988 AMC at 2221 (emphasis added).

Nakano imposed no requirement that the government have exercised operational control over the vessel in order to be liable; the vessel SS SANTA ADELA was operated *for* the United States, not *by* the United States. *Nakano* imposed no requirement that a vessel have been bareboat chartered to the United States in order for the United States to become liable for maintenance and cure claims; the vessel SS SANTA ADELA was time chartered to the United States. Claims that exposed the SS SANTA ADELA to potential *in rem* liability were transferred to the United States, just as Herbert Anderson's claims that expose the MAJOR STEPHEN PLESS to potential *in rem* liability are transferred to the United States. Ronald Nakano's claims against the vessel operator were dismissed by virtue of section 745 of the Suits in Admiralty Act, just as Herbert Anderson's claims against Waterman should be dismissed by virtue of section 745 of the Act.

The Suits in Admiralty Act was held to apply where unseaworthiness claims were asserted arising out of conditions aboard a vessel time chartered to the government in *Peneiro v. United States*, 65 F.Supp. 191, 192 (N.D. Cal. 1945) (*"Peneiro II"*). In that case, the court held that the Suits in Admiralty Act imposes liability *in personam* upon the United States based upon the unseaworthiness of the GLORIA, a vessel time

chartered to the United States:

> "Both the Senate and House Committee reports upon the bill, which later became the Suits in Admiralty Act, clearly indicate that the Congressional purpose was not solely to immunize the United States from seizure of government owned merchant vessels, but as well to eliminate the embarrassment and handicap of *in rem* admiralty proceedings against merchant vessels employed in the service of the United States. See House Report No. 497, page 3 and Senate Report No. 223, pages 1-3, accompanying S.3076, 66th Cong. 2nd Sess."

Peneiro II, 65 F.Supp. at 193.

Another case with which the Louisiana rulings conflict is *Epstein v. U. S.*, 86 F.Supp. 740 (S.D. N.Y. 1949), holding that a privately owned vessel time chartered to the United States was "operated for the United States" within the meaning of the Suits in Admiralty Act, 46 USC §741.

The rulings by the Louisiana courts are also at odds with the analysis of noted admiralty scholars Grant Gilmore and Charles L. Black, who wrote that under the Suits in Admiralty Act, "Recovery *in personam* may be had against the United States where either an *in rem* or an *in personam* liability would have arisen on the same facts as against a private owner." The Law of Admiralty, G. Gilmore & C. Black, 2nd Ed. 1975 at page 982 (emphasis added).

II. The Louisiana courts erred in holding that "factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty" when the United States is not even a party to the suit.

A. WHETHER THE UNITED STATES COULD BE HELD LIABLE BY VIRTUE OF THE SIAA IS A LEGAL ISSUE TO BE DECIDED BY THE COURT, NOT A FACTUAL ISSUE TO BE DECIDED BY A JURY.

The Louisiana Fourth Circuit mistakenly found that "factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty." December 17, 1999 order denying Waterman's application for supervisory writs at p.2. There are no factual questions here; this is purely a legal issue. Indeed, the United States is not even a party to this case, so the jury will never be called upon to decide whether the United States should be held liable.[7]

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[7]Either the supply ship that carries military supplies and is operated exclusively for the Department of Defense can be arrested, or it cannot. If it cannot, as section 741 plainly states, then Anderson's claims that could have been asserted *in rem* are, as a matter of federal statutory law, converted to *in personam* claims against the United States. The *in personam* remedy against the United States is exclusive and in lieu of any remedy against Waterman. This legal issue should be decided at this juncture by the United States Supreme Court. The applicability of the Suits in Admiralty Act is a legal issue is for this Court, not a factual issue for the jury.

A determination that the Suits in Admiralty Act applies can be made from a review of the pleadings attached in the Appendix of this brief. The petition plainly raises unseaworthiness and maintenance and cure claims. The Affidavit of Peter M. Johnston demonstrates that on the date Anderson contends he was hurt, the *MAJOR STEPHEN PLESS* was under charter to the United States and was carrying exclusively military cargo; these facts have never been disputed. The Suits in Admiralty Act therefore applies as a matter of federal law.

Whether a suit could be maintained against a private vessel when the suit was filed is a legal issue ripe for adjudication by the Court now, not a factual one for jury consideration at trial. Anderson's unseaworthiness and maintenance and cure claims could have been directed against the vessel, so, as a matter of law, a personal liability can be claimed against the Government by virtue of the Suits in Admiralty Act.

Although Anderson brought suit in state court against Waterman *in personam* rather than in federal court against the vessel *in rem,* liability is still transferred to the United States under the Suits in Admiralty Act. The question under the SIAA is not whether an *in rem* claim has been brought, but rather, whether a suit could have been maintained *in rem* against a private vessel when the suit was filed. *Olavarria & Co. v. United States,* 56 F.Supp. 758, 762 (S.D.Ala.1944). If *in rem* claims could have been brought against the privately owned vessel being operated for the United States, then *in rem* seizures are forbidden under section 741, the United States is substituted as the proper party defendant under section 742, and the operator is shielded from liability pursuant to section 745. "[I]f the suit could be

maintained against a private vessel when the suit was filed, a personal liability can be claimed against the Government." *Olavarria & Co.*, 56 F.Supp. at 762 (emphasis added).

Anderson's claims could have been brought against the MAJOR STEPHEN PLESS, a privately owned vessel operated for the United States, so he is forbidden by section 741 from either suing the vessel initially or foreclosing upon a maritime lien; liability for his claims is transferred to the United States by section 742; and Waterman, the private operator, is shielded from liability by section 745.

The private operator of the MAJOR STEPHEN PLESS is immune from suit as a matter of federal statutory law. There is no need for a trial. This Court should exercise its authority to correct the erroneous construction of a federal statute by the Louisiana courts.

III. The Louisiana courts erred in failing to recognize that where unseaworthiness and maintenance and cure claims are asserted against the operator of a vessel carrying military cargo for the United States, the SIAA substitutes an *in personam* claim against the United States, and that remedy is in lieu of any other claim against the operator, even Jones Act negligence claims.

A. A REMEDY UNDER THE SUITS IN ADMIRALTY ACT IS EXCLUSIVE AND IN LIEU OF ANY CLAIM AGAINST THE OPERATOR OF THE VESSEL

Another flaw in the Louisiana Fourth Circuit Court

of Appeal's analysis of federal statutory law, which the Louisiana Supreme Court allowed to stand, is its theory that the exclusivity shield of section 745 could apply to one of Anderson's claims, but not another. Either the federal statute applies in this case or it does not; there is no middle ground. Once a remedy is provided by the Suits in Admiralty Act, the exclusivity of liability provisions of section 745 are triggered, and the government's liability is exclusive and in lieu of any other claim against the operator of the vessel arising out of Anderson's personal injury on board the MAJOR STEPHEN PLESS: "*Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States ... whose act or omission gave rise to the claim". 46 U.S.C. section 745 (emphasis added).

Anderson's assertion of unseaworthiness and maintenance and cure claims trigger potential *in rem* liability on the part of the MAJOR STEPHEN PLESS, so an *in personam* remedy against the United States is substituted. 46 U.S.C. sections 741-742. This remedy is in lieu of any other claim against the operator, Waterman Steamship Corporation, arising out of the accident of Herbert Anderson on board the MAJOR STEPHEN PLESS, including any Jones Act negligence claims. 46 U.S.C. section 745. The Louisiana Fourth Circuit's opinion that "[W]e deny the writ in regards to Plaintiff's claim under the Jones Act" mistakenly implies that even though Anderson has asserted unseaworthiness claims that trigger *in rem* liability, the Jones Act claims could somehow proceed against the operator. This is not the case. Once the Act applies, and a remedy is provided against the United States, the operator is then

statutorily shielded from any liability by virtue of the exclusivity of liability provisions of section 745.

CONCLUSION

The holdings of the Louisiana courts expose private operators of vessels carrying military cargo to suit in state court, in contravention of the exclusive federal jurisdiction provisions of SIAA section 742, and to liability in contravention of the exclusivity of liability provisions of SIAA section 745. The holdings also leave the United States vulnerable to having its privately operated ships arrested for personal injury claims, in contravention of SIAA section 741, even if the ships carry ammunition vital to United States military operations underway overseas.

WHEREFORE, Waterman Steamship Corporation respectfully prays that the United States Supreme Court GRANT its petition for *certiorari*, REVERSE the ruling of the Louisiana Supreme Court, and order that claims against Waterman, the private operator of the vessel chartered to the government, be DISMISSED.

Respectfully submitted this 19th day of April, 2000.

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